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SUPREME COURT OF THE UNITED STATES

..... TERM, 1955.

No. 835 1115

LILLIAN M. JONES, PETITIONER,

VS.

AVCO MANUFACTURING CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

E. A. (BERT) TAYLOR,
JOHN L. SHERIDAN,
DONALD E. RAYMOND,
Counsel for Petitioner.

PEW, TAYLOR, WELCH & SHERIDAN,
525 Argyle Building,
Kansas City, Missouri,
Of Counsel.

E. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lillian M. Jones (in whose favor the jury returned a verdict) respectfully petitions for a writ of certiorari to review a final judgment and decision of the United States Court of Appeals for the Eighth Circuit affirming a judgment in favor of respondent in the District Court of the United States for the Western District of Missouri entered notwithstanding the verdict of the jury. The action is based upon negligence in the operation of a motor vehicle resulting in injuries to petitioner. Petitioner, at the time of institution of this action was a

citizen of the State of Missouri; respondent is a corporation organized under the laws of the State of Delaware; the amount of damages prayed for in petitioner's petition was seventy-five thousand dollars and the verdict returned by the jury in favor of petitioner was twenty-five thousand dollars. The style of the case in the United States Court of Appeals is "Lillian M. Jones, Appellant, vs. Avco Manufacturing Corporation, Appellee, No. 15117." The opinion is reported at 218 F. 2d 406, and appears in the record (S. R. p.....).* The opinion of the trial court in denying respondent's motion for summary judgment is reported at 113 F. Supp. 923. The judgment and decision of the United States Court of Appeals became final on March 1, 1955, the date when petitioner's petition for rehearing was denied (S. R. p. .....), and petitioner had exhausted her remedies in the United States Court of Appeals.

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

On April 22, 1954, petitioner (plaintiff) was riding in the automobile of Eldon Jones, respondent's employee, on a trip from Kansas City, Missouri, where Jones was stationed to Oklahoma City, Oklahoma, where Jones was called to perform services for respondent (R. p. 40). The Jones automobile collided with another automobile injur-

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*Petitioner has used the abbreviation (R. p. ....) to refer to that portion of the Record here consisting of the Record filed in the Circuit Court of Appeals. The abbreviation (S. R. p. ....) is used to refer to the Supplemental Record consisting of the transcript of proceedings in the United States Court of Appeals for the Eighth Circuit. Respondent's Supplemental Record below duplicates petitioner's Record in all respects here material and is not referred to herein.

ing petitioner. Petitioner alleged in her petition that Jones was acting on behalf of respondent (R. p. 3); the trial court instructed the jury that in order to find for petitioner they must find that Jones in the course of his authority invited petitioner to ride with him to Oklahoma City to render substantial service in the furtherance of respondent's business (R. p. 119), and that at the time of the collision Jones was acting within the scope of his employment and that in the course and scope of his employment he was authorized to invite petitioner to ride with him (R. p. 122). The verdict of the jury (R. p. 131) in favor of petitioner against respondent established that the jury did find that Jones, in making the trip and in having petitioner accompany him, was acting within the course and scope of his employment.

The Court of Appeals, in its opinion, states that there was no express or implied authority given Jones by respondent to transport anyone with him on the trip (S. R. p. ——).

This ruling is in direct conflict with the verdict of the jury, and overlooks the rule followed in Federal Courts that, in passing upon a motion under Rule 50, Rules of Civil Procedure, 28 U. S. C. A., the court must treat as established all facts which the favorable evidence reasonably tends to prove and draw all inferences in favor of the verdict fairly deducible from such facts.

McGivern v. *Northern Pacific Ry. Co.*, 8 Cir., 132 F. 2d 213.

Dierks Lumber & Coal Co. v. *Mabry*, 8 Cir., 128 F. 2d 1005.

White Bear Theatre Corp. v. *State Theatre Corp.*, 8 Cir., 129 F. 2d 600.

The evidence disclosed that Jones was field service supervisor for respondent in a six state area. His duties

were to contact the distributors in the territory as the service representative of respondent (R. pp. 30, 84). He was stationed in Kansas City by respondent and traveled throughout the territory from that point (R. pp. 31, 84-85, 86). He was required to solve any service problem which might develop in the territory (R. p. 31).

Jones' superior in the respondent company, Alvin P. Smith, testified that Jones was on his own in servicing his territory; he had discretion as to how to operate his territory and was free to plan his complete program, unless advised on some specific matter (R. pp. 84-85). He also testified that service supervisors had taken their wives with them on business trips without first notifying the company (R. pp. 92-93); and that he could not recall ever having discouraged the practice (R. pp. 88, 92).

Jones also testified that he was given discretionary authority as to how to handle his work (R. p. 31).

Respondent's distributor in Oklahoma City had had a service problem of some duration (R. p. 25). The distributor's service manager telephoned Jones on Saturday, April 21, 1951, and requested Jones to bring petitioner to Oklahoma City to shop retail dealers in an effort to determine the source of the service problem (R. p. 27).

Jones' testimony as to his obligation to respondent to fulfill this request is as follows:

> "It was part of my obligation to call on the Maxwell Company as one of the distributors of Avco on regular routine calls. It was my duty to respond when a distributor called me and asked me to come down. It was part of the planning that Mr. Rosenberry proposed to me that I come and bring Mrs. Jones for shopping. It was part of my job to be there whether she could go or not. I was never restricted as to who assisted me with my work if I needed it. If I needed

a certified accountant, I got one, if I needed a public stenographer I got one.

Q. But you had no authority to employ or hire a shopper, did you?

A. I did not employ one.

Q. No, and you did go down to—you would have gone to Oklahoma City regardless of whether Mrs. Jones could have gone that day or not? If she couldn't have gone anyway to be there on Monday to meet with him isn't that a fact?

A. If Mrs. Jones had not been able to go on that particular time I probably would have then scheduled it for another time. I probably would have gone down by myself but I would still have had to carry out his request if at all possible" (R. pp. 61-62).

Petitioner's shopping activities are described by the Court of Appeals in its opinion (S. R. p. .....) as follows:

> Mrs. Jones, being with her husband during the time he was affected with arthritis, would frequently be of assistance to him in working out these differences by "shopping" the retailers, *i. e.*, acting as a prospective customer, learning what representations were being made and reporting to her husband. That information was useful and valuable to him when he called the retailer, the service agency, and the distributor together to work out their differences. In assisting her husband, Mrs. Jones, of course, was of assistance to her husband's employer in whose services her husband was engaged. Avco knew of Mrs. Jones' activities in this regard and commended Jones for the practice.

Respondent rested on its Motion for Directed Verdict and introduced no evidence in chief. There is no affirma-

tive evidence in the record that Jones did not, in fact, have the authority claimed by petitioner.

The conclusion of the Court of Appeals that Jones did not have authority to take petitioner so that she might perform services of benefit to respondent, in a matter entrusted to Jones' discretion in carrying out his duties for respondent, is in direct contradicition of testimony in the record and of the inferences reasonably to be drawn from the facts testified to. The decision of the Court of Appeals, not only violates the requirement under Rule 50 (b) that the court may not set aside a verdict and enter judgment on a motion if there is any substantial evidence to sustain the verdict; but it also deprives petitioner of her right to have the jury pass upon the evidence as to this issue.

II.

STATEMENT AS TO JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Sec. 1254, to review a judgment of the United States Court of Appeals for the Eighth Circuit rendered in the case of Lillian M. Jones, Appellant, vs. Avco Manufacturing Corporation, Appellee, No. 15117, affirming a judgment in favor of respondent entered upon respondent's Motion for Judgment *Non Obstante Veredicto.* The opinion is reported 218 F. 2d 406 and appears in the Record (S. R. p. ——).

The judgment of the United States Court of Appeals violates the provisions of Rule 50, Rules of Civil Procedure, 28 U. S. C. A., and denies petitioner's right which she claimed and to which she was entitled under Rule 38, Rules of Civil Procedure, 28 U. S. C. A., and the United States Constitution, Amendment VII, to a jury trial in her cause.

On February 21, 1955, the opinion was handed down affirming the judgment of the United States District Court for the Western District of Missouri (S. R. p. .....). On February 10, 1955, and in due time, petitioner filed her petition for rehearing in said Court of Appeals (S. R. p. .....), which petition was denied on March 1, 1955. On motion of petitioner for a stay of the mandate pending petition to this Court for a writ of certiorari, an order was entered on March 15, 1955, staying the mandate for thirty days from March 15, 1955, and providing that if there is filed a certificate of the clerk of this Court with the clerk of said Court of Appeals that a petition for writ of certiorari, record, and brief have been filed within said thirty-day period, the stay granted shall continue until final disposition of this cause by this Court (S. R. p. .....).

III.

QUESTIONS PRESENTED.

1. Did the Court of Appeals deny petitioner her right under Rule 50, Rules of Civil Procedure, 28 U. S. C. A., to have the jury pass upon the issue of whether respondent's agent and servant was acting within the scope of his employment in taking petitioner on the trip during which she was injured, when there is substantial evidence to support petitioner's claim on this issue.

2. May the Court of Appeals, by disregarding evidence in the record substitute its conclusions for the verdict of the jury in an action which was tried to a jury.

3. Was petitioner denied her right under the United States Constitution, Amendment VII, to have her cause tried by a jury by the action of the Court of Appeals in not mentioning in its opinion (S. R. p. .....) the evidence supporting the verdict of the jury.

IV.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

By its failure to consider the evidence favorable to petitioner's claim, and failing to consider the inferences drawn by the jury from that evidence, the Court of Appeals has deprived petitioner of her right to jury trial of her cause guaranteed by the United States Constitution, Amendment VII.

Lavern v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916.

Tennant v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

By its failure to give petitioner the benefit of the favorable inferences which may fairly be drawn from the evidence favorable to her claim, the Court of Appeals has departed fully from the accepted rules governing the consideration of motions under Rule 50, Rules of Civil Procedure, 28 U. S. C. A., to an extent which, in effect, makes the appellate court a fact-finding body, disregarding the findings of the jury.

Conway v. *O'Brien*, 312 U. S. 492, 61 S. Ct. 634, 85 L. Ed. 696.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, to the end that the judgment of that Court in the cause above mentioned may be reviewed; that upon such review the judgment of that Court may be reversed; and for such

other and further relief in the premises as this Court may deem meet and just.

E. A. (BERT) TAYLOR,
JOHN L. SHERIDAN,
DONALD E. RAYMOND,
Counsel for Petitioner.

PEW, TAYLOR, WELCH & SHERIDAN,
525 Argyle Building,
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